

HANDOUT #~~X~~2

~~January 30~~February 4, 2009

**Bay Delta Conservation Plan
Governance Working Group
Preliminary Draft Recommendations for Governance Structure
~~January 29~~February 3, 2009**

~~This is a progress report on the Governance Workgroup's discussion of governance structure. draft 4 incorporates the Steering Committee's Jan. 30th comments on our Jan. 29th draft. The workgroup will continue discussion on these provisions and adaptive management, over the next few weeks, with an emphasis on [bracketed topics]. We request comments and suggestions from other members of the Steering Committee.~~

Permittees

1. A permittee under Endangered Species Act (ESA) section 10(a)(1)(B), the NCCPA section 2835, and ~~section 2081 of the~~ California Endangered Species Act (CESA) section 2081 is the non-federal entity authorized to incidentally take listed species for covered activities subject to the conditions stated in the BDCP. ESA section 7(a)(2) provides the basis for incidental take authorization for a federal entity. We use the term "permittee" to refer to the entity that receives such incidental take authorization under any of the foregoing regulatory processes for all or a portion of the BDCP covered activities, including water supply operations.¹
2. California Department of Water Resources (DWR) will be a permittee under Endangered Species Act (ESA) section 10(a)(1)(B) and NCCPA section 2835. [This is a preliminary recommendation. The Governance Workgroup continues discussion of the alternatives described in point 3.]
 - 2.1. The State of California, through DWR, will construct and own the new conveyance facility. ~~[See point 2.3 about the possibility of several state permittees.]~~
 - 2.2. Pursuant to existing authority, DWR will continue to own existing State Water Project (SWP) Delta facilities, including the Banks Pumping Plant.

¹ USBR representatives have stated that "permittee" is not an accurate description of USBR's status under ESA section 7(a)(2). The Governance WG will find mutually agreeable terminology as we develop Chapter 7.

The plan activities will also require permitting under laws other than ESA, CESA, and NCCPA. These include: California Water Code sections 1000 et seq. (water rights), Water Code sections 13000 et seq. (water quality), California Fish and Game Code sections 5900 et seq. (fish screens, channel modification), Clean Water Act section 404 (dredge and fill), and so forth. [The Governance Workgroup will continue to discuss how to design governance that will comply with all permitting requirements applicable to plan implementation.]

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3. The plan will specify whether DWR will be the sole state permittee for the purpose of operating the new conveyance facility, or joint with another entity. *[As reflected below, Governance Workgroup continues to discuss (i) whether DWR will be the sole state permittee ~~and (ii) responsibility for operations, or whether some other public entity under state law (e.g., JPA of contractors and DWR) may be a joint or alternative permittee for this purpose; and (ii) whether the permit responsibility for operations runs to the same or different entities that have construction responsibility.]~~*
- ~~3. U.S. Bureau of Reclamation (USBR) will receive incidental take authorization under ESA section 7(a)(2).~~
 - ~~3.1. USBR will enter into an agreement with DWR to obtain capacity and other rights in the new conveyance facility.~~
 - ~~3.2. USBR will continue to own existing Central Valley Project (CVP) facilities, including the Jones Pumping Plant.~~
- 3.1. A Joint Powers Authority (JPA) will be established by the SWP and CVP Contractors. *-[The SWP and CVP Contractors and DWR continue to discuss whether DWR would be a member of the JPA, and whether the JPA itself could be a permittee.- They expect to report back to the Governance Workgroup shortly.]*
- 3.2. The JPA could assist in implementing habitat conservation measures and other plan elements.
- 3.3. The JPA could be a permittee under ESA section 10(a)(1)(B), NCCPA section 2825, or CESA section 2081, or it may receive regulatory coverage as specified in the BDCP and its implementing agreement. *{DWR and the contractors will continue to discuss and report back to the Governance Workgroup shortly.}*
4. U.S. Bureau of Reclamation (USBR) will receive incidental take authorization under ESA section 7(a)(2).
 - 4.1. USBR will enter into an agreement with DWR to obtain capacity and other rights in the new conveyance facility.
 - 4.2. USBR will continue to own existing Central Valley Project (CVP) facilities, including the Jones Pumping Plant.

Implementing Entities

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5. NCCPA section 2820(b) provides: “A natural community conservation plan approved pursuant to this section shall include an implementation agreement that contains [specified elements].” This agreement specifies responsibilities of named entities for plan implementation. Similarly, an incidental take authorization under ESA section 7(a)(2), or a HCP, specifies responsibilities for plan implementation. We use the term “implementing entity” to refer collectively to such entities.
 - 5.1. An implementing entity may be a permittee for the purpose of plan implementation.
~~It~~
 - 5.2. An implementing entity may be a contractor with a permittee, engaged to perform specified tasks in plan implementation. In the latter event, its take authorization is derivative of the permittee’s, and the permittee oversees its performance.
6. ~~At minimum,~~ DWR will be an implementing entity under NCCPA section 2820(b). *[As stated above in point 3, Governance Workgroup continues to discuss whether DWR will be sole implementing entity for operations of new conveyance DWR’s permit status.]*
 - 6.1. The Contractor JPA may be an implementing entity. The BDCP and the implementing agreement will specify its responsibilities
7. USBR will also have responsibilities for implementation as specified in the BDCP and associated incidental take authorization. *[Governance Workgroup continues to discuss what those responsibilities will be.]*
- ~~8. The Contractor JPA may be an implementing entity. The BDCP and the implementing agreement will specify its responsibilities. [Governance Workgroup will discuss this further, once Contractors and DWR report the results of their discussion.]~~
8. A Delta Conservancy, if established, may be an implementing entity -for purpose of implementing habitat conservation measures. *[The Governance Workgroup continues discussion to discuss how to structure relationship between permittees and Delta Conservancy.]*
 - 8.1. In any event, Delta Conservancy will be able to accept public funds directly or through another State or Federal agency for implementation of specified measures in BDCP.
 - 8.2. Permittees will have authority to terminate Delta Conservancy’s responsibilities under the implementing agreement, if they conclude that its performance does not comply with the plan or otherwise is insufficient. *[Governance Workgroup will discuss further consequence of non-performance related to portions of the plan funded by the State or Federal governments.]*

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9. Other public agencies and private entities may also be implementing entity/entities under the same logic described in point 98.

BDCP Implementation Council

10. Stakeholders will participate in an Implementation Council to consult with the permittees, any other implementing entities, and regulatory agencies in the implementation of the plan.

11. ~~As specified in the~~ The plan and implementing agreement, ~~members~~ will ~~include~~ specify eligibility criteria for membership. Such criteria will cover: (i) permitting agencies, (ii) other members of the existing BDCP Steering Committee ~~who support the plan~~, (ii) the, (iii) Delta Counties, and (iiiiv) other stakeholders whose assistance will increase the likelihood of success in implementation.

12. The Implementation Council will have two functions: oversight/consultation and dispute resolution. ~~f between permittees, implementing entities, and other members.~~ [The Governance Workgroup ~~continues~~ will continue to discuss the desirability and utility of both functions. As to the first, how should consultation occur to assist (rather than conflict with) (i) permittees' obligation to perform timely and (ii) regulatory agencies' authorities to assure compliance with take authorizations? As to the second function, how should non-binding dispute resolution be structured (i) to have a reasonable prospect of success and (ii) advance, not prejudice, the interests of the participants? Generally, the workgroup will continue to discuss whether these functions would add value to plan implementation, and if so, how to optimize such value.]

- 12.1. ~~The~~ The plan will specify procedures for these functions. These procedures will be designed and implemented to be efficient and specifically to permit the implementing entity(ies) will periodically report to council members on past activities and upcoming plans. They will consider member's comments and recommendations. ~~The plan will establish, and the Implementation Council will use, reporting (including meeting) procedures which are entities to~~ timely and efficient. ~~Such~~ implement permit obligations. These procedures may vary by plan element.

- ~~15. The plan will establish, and the Implementation Council will use, non-binding procedures for dispute resolution between the permittees and council members. Such disputes will concern sufficiency of plan implementation, including the performance of adaptive management. The plan will specify such procedures, and the Implementation Council will use them, to minimize the risk and scope of litigation related to plan implementation.~~

~~Such oversight and dispute resolution~~

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- 12.2. Such procedures will fully preserve the existing authorities of any member, including regulatory agencies, to act as required by such authorities. The agencies will not delegate any such authorities to the Implementation Council.
- 12.3. Such procedures will comply with applicable requirements of open meeting laws.
13. The implementing entity(ies) will periodically consult with other council members on past activities and upcoming plans, including (i) operations, (ii) habitat restoration, (iii) strategies for other stressors, and (iv) adaptive management. They will consider member's comments and recommendations.
14. The plan will establish, and the Implementation Council will use, non-binding procedures for dispute resolution between the permittees and council members. Such disputes will concern sufficiency of plan implementation, including the performance of adaptive management. ~~Regional~~ Such procedures will be designed and implemented to minimize the risk and scope of litigation related to plan implementation, while reserving each council's members legal rights related to such litigation.

Coordinated Governance

15. The plan will contain appropriate provisions to reconcile this governance ~~for the purpose~~ of plan implementation with ~~regional~~overall governance ~~adopted of Delta natural resources established~~ pursuant to the recommendations of Delta Vision or otherwise.
16. The plan may contain provisions (acceptable to the permitting agencies) that provide for coordinated regulation of third parties whose facilities and activities affect achievement of plan goals and objectives.